

A NEW APPROACH TO SHAREHOLDER STANDING BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

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INTRODUCTION

Imagine that the year is 2020, and Russia has successfully annexed half of Ukraine, fully integrating it into its territory. The Putin regime

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decides to track down all of the businesses owned by individuals, both Ukrainian nationals and foreigners, who opposed the territory's incorporation into Russia. Once Putin identifies the offenders, he persuades prosecutors to bring trumped-up charges against each entity for tax evasion, fraud, and corruption. While the businesses contest these charges in court, the vast majority of them lose, and they are compelled to pay astronomical sums in fines and damages. As a result, the businesses are forced into bankruptcy and a Russian court appoints two liquidators to oversee the bankruptcy proceedings: one to represent the interests of the businesses, and the other to represent the interests of the state (from whom the businesses had received substantial loans).

The shareholders of one affected business, Enterprise X, see the writing on the wall and file a complaint against Russia with the European Court of Human Rights (ECHR) alleging a violation of the right to property. The shareholders, who come from many different countries, argue that Russia's actions constitute an impermissible interference with their shares in the company (as explained below, a protected form of property), and they claim damages to compensate them for their losses. However, the ECHR dismisses their complaint, holding that the shareholders themselves were not injured by Russia's actions, since Enterprise X *itself* could have brought the suit to the ECHR through its two liquidators. Of course, the liquidators (both of whom were appointed by a Russian court, and not chosen by the shareholders) did not do so. The practical result of this ruling is that the shareholders' investments in the companies were entirely lost.

The possibility of these events occurring is not so farfetched. The Putin regime in Russia has been more than willing to seize the assets of its critics,¹ and the facts of this hypothetical are based on the facts from the ECHR's seminal case on shareholder rights.² This hypothetical highlights how the ECHR's current approach to shareholder standing can lead to unjust results, and why the ECHR should adopt a new standard. As explained below, the ECHR's current rule for deciding whether shareholders can bring claims directly to the Court lacks clarity, and is

1. See Megan Davies and Douglas Busvine, *With Khodorovsky out, Yukos investors fight on*, REUTERS (Feb. 12, 2014, 10:00 AM), <http://www.reuters.com/article/2014/02/12/us-russia-yukos-idUSBREA1B>

1BN20140212 (explaining that the oil group, Yukos, is accusing Russia of imposing fake taxes and stealing assets to bankrupt the company); see also Michael D. Goldhaber, *Yukos Majority Shareholders Hit a \$50 Billion Gusher*, THE AMERICAN LAWYER (July 28, 2014), available at <http://www.americanlawyer.com/id=1202664699487> (stating that an arbitration tribunal has held the Russian Federation liable for \$50.02 billion for seizing the assets of AOA Yukos Oil Company).

2. See *generally* Agrotexim and Others v. Greece, 330 Eur. Ct. H.R. 3 (ser. A) (1995).

based on outdated reasoning. It is time for a new approach to take its place.

Readers unfamiliar with the ECHR may be surprised by the very idea that corporate shareholders are able to assert any claims before a human rights tribunal.³ However, one of the cornerstones of the ECHR's jurisprudence is its consistent protection of the right to property.⁴ This right to property, as both the Court and scholars have made clear, includes the right to own shares in a corporation.⁵ In addition, the protection of property is not limited to natural persons; the right of "legal persons" (in other words, corporations and other entities) to be free from harm done to their property is also enshrined in Article 1 of Protocol 1 to the Convention (Protocol 1).⁶ Corporations have successfully brought suit at the ECHR against governments who have unlawfully interfered with their property interests in numerous cases, and the Court has awarded these corporations significant damage awards.⁷

However, the Court has often not been as welcoming towards

3. See Anna Grear, REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY 23–49 (Chistien Van Den Anker ed., Palgrave Macmillan, 2010) (discussing and challenging the theoretical underpinnings of granting human rights to corporations under the ECHR).

4. See Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT'L L.J. 1, 4 (2008) ("[T]he ECHR's adjudication of property rights claims by business entities is indisputably authorized by Article 1's text and the intent of its drafters."); Winfried H.A.M. van den Muijsenbergh & Sam Rezai, *Corporations and the European Convention on Human Rights*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 43, 44–68 (2012) (arguing that corporations rightfully have a place in the European human rights regime).

5. See Christoph Schreuer & Ursula Kriebaum, *The Concept of Property in Human Rights Law and International Investment Law*, in HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW 743, 753 (Stephan Breitenmoser et al. eds., 2007) ("[S]hares undoubtedly [have] an economic value and constitute[] 'possessions.'"); see MARIUS EMBERLAND, *THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION* 67, 70 (Oxford Univ. Press, 2006) [hereinafter Emberland, *Human Rights of Companies*] ("[a] share itself is the shareholder's property and is considered as such by international law."); see also *Bramelid and Malmstrom v. Sweden*, App. Nos. 8588/79 and 8589/79, 29 Eur. Comm'n H.R. Dec. & Rep. 64, 81 (1982) (determining that shares of a company were 'possessions' that triggered the right of ownership under Protocol 1).

6. Protocol to the Convention of the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter Protocol 1] ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.").

7. See, e.g., *Uniya OOO v. Russia*, App. Nos. 4437/03 and 13290/03, Eur. Ct. H.R., § 351 (2014), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144946> (awarding one of the applicant corporations over 3 million euros in damages for Russia's violation of its Protocol 1 right); *Centro Europa 7 S.R.L. v. Italy*, App. No. 38433/09, Eur. Ct. H.R. (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117596> (awarding the applicant corporation damages of 10 million euros as a result of a violation of its Protocol 1 right to property, in addition to other rights that the Italian government had violated); see also David Anderson, *Compensation for Interference With Property*, 6 EUR. HUM. RTS. L. REV. 543, 543–58 (1999) (discussing the ECHR's practice of compensating aggrieved parties for interference with property).

shareholders who attempt to bring claims at the ECHR. In 1995, the Court adopted a strict test for determining whether or not shareholders meet the “victim” requirements of Article 34 of the European Convention, which determines standing before the Court.⁸ Under *Agrotexim v. Greece*, the Court only grants shareholders victim status, and therefore standing, in the following “exceptional” circumstance: where it is “clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or—in the event of liquidation—through its liquidators.”⁹ This test, derived from the International Court of Justice’s (ICJ’s) holding in *Barcelona Traction, Light and Power Company, Limited*, has presented a significant barrier to shareholders seeking redress under the European Convention ever since the decision was issued.¹⁰

Although the test to determine shareholder standing appears straightforward, in practice the Court has not applied it consistently, arguably starting with the *Agrotexim* case itself.¹¹ One commentator has characterized the Court’s approach since *Agrotexim* as “subscribing to a pragmatic outlook under the pretence [sic] of formalism.”¹² As a result, prospective shareholder applicants have been left with a tangled maze of jurisprudence based on outdated reasoning, leading to a lack of clarity and potentially unjust results.¹³ Therefore, the ECHR should abandon its current standard and adopt a more realistic multifactor test that would allow shareholders to seek redress at the Court when their property rights—and not merely their financial interests—have been infringed by the

8. See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 34, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention] (“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”).

9. *Agrotexim and Others v. Greece*, 330 Eur. Ct. H.R. 3 (ser. A) ¶ 66 (1995) (emphasis added).

10. See *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 1, 43.

11. See *infra* Part I (discussing the Court’s reasoning in *Agrotexim*).

12. Marius Emberland, *The Corporate Veil in the Case Law of the European Court of Human Rights*, 63 HEIDELBERG J. INT’L LAW 945, 954 (2003) [hereinafter Emberland, *Corporate Veil*].

13. Compare *Agrotexim*, 330 Eur. Ct. H.R. 3 (ser. A) (not granting shareholder applicants standing) with *Sovtransavto Holding v. Ukraine*, App. No. 48553/99, 38 Eur. H.R. Rep. 44 (2002) (granting shareholder applicants standing without any real discussion of whether or not they met the requirements of Article 34). See also *OAO Neftyanaya Kompania Yukos v. Russia*, App. No. 14902/04, Eur. Ct. H.R., Judgment ¶ 1 (2012) (granting standing to the applicant shareholders without a discussion of whether they met the requirements of Article 34); but see *OAO Neftyanaya Kompania Yukos v. Russia*, App. No. 14902/04, Eur. Ct. H.R., Judgment on Just Satisfaction (2014) (Bushev, J., dissenting in part) (“We believe that the majority has in essence departed from the Court’s case-law regarding the criteria for assessing a company’s shareholders as victims and injured parties.”).

government.

The test should include the following factors: whether the shareholder claimed that one of its legal rights was infringed (as opposed to a claim that the government harmed its monetary interests), to what extent the shareholder exercised control over the company, to what extent it was impossible for the company itself to file suit at the ECHR, and the severity of the harm that the shareholder suffered.

This Note will proceed in three parts. Part I will analyze and explain the reasoning of *Agrotexim* in order to set the stage for the rest of the ECHR's shareholder rights jurisprudence. It will also discuss *Barcelona Traction*, an ICJ judgment upon which the ECHR relied heavily to establish its test for shareholder standing in *Agrotexim*.¹⁴ Part II will explain the criticism that has been levied against the *Barcelona Traction* standard and examine the Court's more recent jurisprudence on the protection (or lack thereof) of shareholders. It will pay particular attention to the inconsistencies in the Court's analyses of the factors that it considers. Finally, Part III will argue that the Court should abandon its current standard in favor of a more pragmatic and straightforward test that adequately protects shareholders when they are otherwise unable to seek redress.

I. THE SOURCE OF THE ECHR'S INADEQUATE TREATMENT OF SHAREHOLDERS: *AGROTEXIM V. GREECE*

Despite the ECHR's willingness to protect corporate property under Protocol 1,¹⁵ the Court has been far more restrictive when reviewing shareholders' claims.¹⁶ As introduced above, the main obstacle for shareholders is Article 34 of the European Convention, which defines the "victim" requirement in order to appear at the ECHR.¹⁷ Under the Court's current jurisprudence, shareholders are not "victims" unless the injury directly harms shareholder property, or violates one of the legal rights that shareholders enjoy, such as dividends issued, voting rights, or the right to a

14. See *Barcelona Traction*, 1970 I.C.J. at ¶¶ 85, 92–93.

15. See Protocol 1, *supra* note 6; see also *Pressos Compania Naviera S.A. v. Belgium*, 332 Eur. Ct. H.R. (ser. A) ¶ 43 (1995) (holding that the Protocol 1 right of the corporate applicants had been violated, resulting in an indirect expropriation of the applicants' property).

16. See, e.g., *Agrotexim*, 330 Eur. Ct. H.R. 3 (ser. A); *CDI Holding Aktiengesellschaft and Others v. Slovakia*, App. No. 37398/97, Eur. Ct. H.R., Decision as to Admissibility ¶ 4 (2001) ("no such exceptional circumstances [that would merit standing] have been established in the present case.").

17. European Convention, *supra* note 8, art. 34 ("The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.").

share in a company's assets after liquidation. Importantly, matters that "concern the corporate person" do not necessarily confer victim status on the *shareholders* of that corporate person.¹⁸ In order to explain the creation of this standard, this section discusses the ECHR's reasoning in *Agrotexim*, the problems with its rationale, and the origins of the *Agrotexim* standard in the *Barcelona Traction* case.

A. The Court's reasoning in *Agrotexim*

The foundational case in the ECHR's jurisprudence on shareholder property rights is *Agrotexim and Others v. Greece*, decided in 1995.¹⁹ In *Agrotexim*, the applicants were six limited liability companies who collectively owned a majority of the shares of a large Greek brewery.²⁰ The brewery was very heavily indebted to the National Bank of Greece, and the Government ultimately ordered its liquidation.²¹ Under a special bankruptcy procedure, two liquidators were appointed by the Athens Court of Appeal and were required to act in concert to manage the bankruptcy.²² One liquidator was charged with representing the interests of the National Bank of Greece, the brewery's main creditor, and the other was charged with representing the interests of the brewery's management.²³ However, the brewery alleged that it did not go bankrupt by its own fault. Instead, it argued that the Athens Municipal Council purposefully destroyed the brewery by announcing its intention to expropriate the land where two of the brewery's factories sat.²⁴ The brewery claimed that this public announcement sabotaged its liquidation sale of the factories by scaring off all potential buyers. Accordingly, the land was not sold but instead claimed by the government, to the great financial detriment of the brewery's shareholders.²⁵ The shareholders brought claims under Protocol 1, alleging

18. See Emberland, *Human Rights of Companies*, *supra* note 5, at 71.

19. 330 Eur. Ct. H.R. 3 (ser. A) (1995).

20. *Id.* ¶ 6.

21. *Id.* ¶¶ 7, 17.

22. *Id.* ¶ 20; *Agrotexim Hellas S.A. and Others v. Greece*, App. No. 14807/89, Eur. Comm'n H.R. Dec. & Rep., ¶¶ 25–26, 29 (1994), available at <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-45639>. Importantly, the facts according to the ECHR and the European Commission differ on this point. See *infra* Part I.B for a discussion describing one of the most interesting facts that was left out by the ECHR, but included by the European Commission: the process of how the liquidators were appointed.

23. *Agrotexim*, 330 Eur. Ct. H.R. 3 (ser. A) ¶ 20. It is also important to note that in 1991 (after the shareholders filed suit at the ECHR), these two liquidators were replaced by a single liquidator designated by the Bank, because "there had been an unjustified delay in the sale" of two of the properties in question. *Id.* ¶ 36.

24. *Id.* ¶¶ 22–34.

25. *Id.* ¶¶ 34, 37–38.

that their right to property had been violated.²⁶

The European Commission was the first entity to treat the applicants' claims, declaring them admissible and finding that the applicants' Protocol 1 right to property had been violated.²⁷ In addressing the issue of whether the shareholders had standing, the Commission noted that:

[T]he applicant's [sic] rights at issue are their rights as majority shareholders in the [brewery]. The measures complained of were directed against the company but also indirectly affected the applicant's [sic] rights. Consequently, insofar as there has been an interference with the company's property rights, this interference must be considered to extend to the applicants' property rights as well.²⁸

Accordingly, the European Commission's view of the situation was clear: as majority shareholders, the applicants' property rights had been negatively affected by the actions of the Greek Government, resulting in a violation of their rights under the European Convention.

The European Commission then referred the case to the ECHR for its decision.²⁹ The majority of the Court, in an 8-1 vote, dismissed the applicants' submission on the ground that it failed to meet the victim requirement.³⁰ The Court declined to follow the European Commission's reasoning because there were too many "risks and difficulties" in applying it, including problems with determining who is entitled to bring suit before the ECHR, and with the requirement of exhausting local remedies.³¹

26. *Id.* ¶ 54. The shareholders also brought claims under Articles 6 and 13, alleging rights to a fair trial and an effective remedy, respectively. *Id.* Interestingly, the Court has more recently ruled that Article 6 claims brought by shareholders are also subject to the *Agrotexim* test, although that issue was not discussed in *Agrotexim* itself. See *Emberland, Corporate Veil*, *supra* note 12, at 951 ("in its two most recent considerations on the merits of a corporate veil claim . . . the Court cited *Agrotexim* as the prevailing formula for deciding on the admissibility of claims which concerned Article 6(1).").

27. See *Agrotexim Hellas S.A.*, Eur. Comm'n H.R. ¶ 51. The Commission did not find violations of the applicants' rights under Articles 6 and 13. For reference, prior to the adoption of Protocol 11 to the European Convention in 1994, individuals did not have the right of direct access to the ECHR. Instead, they had to first submit their claims to the European Commission, which considered admissibility, and issued a non-binding report on the admissibility and the merits. Since Protocol 11 entered into force, individuals apply directly to the ECHR. See Explanatory Report: Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, Nov. 1, 1998, COUNCIL OF EUROPE, available at <http://conventions.coe.int/Treaty/en/Reports/Html/155.htm>.

28. *Agrotexim Hellas S.A.*, Eur. Comm'n H.R., ¶ 59.

29. *Agrotexim and Others v. Greece*, 330 Eur. Ct. H.R. 3 (ser. A) (1995); NETHERLANDS INSTITUTE OF HUMAN RIGHTS, UTRECHT SCHOOL OF LAW (Jan. 13, 2014, 4:18 PM), <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/bd85b31af932d14bc1256681002b47f0/c56b38a2f3aa24c4c1256640004c2c98?OpenDocument>.

30. *Agrotexim*, 330 Eur. Ct. H.R. 3 (ser. A) ¶ 71.

31. *Id.* ¶¶ 65–66. Under the domestic law of many member states, shareholders do not have

Instead, the Court held that:

[T]he piercing of the “corporate veil” or the disregarding of a company’s legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or—in the event of liquidation—through its liquidators.³²

In rejecting the applicants’ submissions, the Court found that there were no exceptional circumstances present in the case, because the company still technically existed as a legal entity at the time that the shareholders filed suit.³³ The shareholders were left completely empty-handed, with nothing to show for their investments.³⁴

B. Bad facts make for bad law

Since reasonable minds disagree about the Court’s legal reasoning in *Agrotexim*, it is important to consider the facts of the case in order to understand how the Court arrived at its conclusion. After all, *Agrotexim* was a case of first impression for the ECHR on shareholder standing.³⁵ Unfortunately, the classic truism that “bad facts make for bad law” appears to be applicable to the ECHR’s ultimate analysis. The Court acknowledged that “the specific circumstances of each case” must be considered in determining whether to grant shareholders victim status separate from that of the corporation.³⁶ However, it glossed over several very important facts that were pertinent to the applicants’ complaint.³⁷ Although commentators have criticized parts of the Court’s reasoning and analysis in *Agrotexim*, they have not fully examined the facts of the case.³⁸ A detailed review of the facts reveals that the Court may have erroneously concluded that the liquidators adequately represented the interests of the corporation and its shareholders.³⁹

First, and perhaps most worrisome, was the Court’s finding that the

separate standing to bring suit for actions that are detrimental to the company in which they own stock.

32. *Id.* ¶ 66.

33. *Id.* ¶¶ 67–68.

34. *Id.*

35. *See generally id.*

36. *Id.* ¶ 63.

37. *Id.*

38. *See, e.g.,* Emberland, *Corporate Veil*, *supra* note 12, at 960–62 (arguing that some of the Court’s analysis does not “provide a satisfactory explanation for non-identification”). Emberland goes on to explain his argument that even though the Court’s textual reasoning may leave something to desire in *Agrotexim*, the larger structural context of the European Union is sufficient to support the principle of non-identification. *Id.* at 962–66.

39. *See infra* Part I.B.

brewery would have been able to bring the suit to the ECHR itself at the time that the applicant shareholders filed their complaint.⁴⁰ The European Commission came to the very opposite conclusion, despite having access to the same information from the parties.⁴¹ It determined that, due to the special liquidation procedure, the brewery was “essentially and effectively under the control of the State so *that it was not reasonably an option* for the company to lodge a complaint against Greece.”⁴²

The Court rejected the Commission’s conclusion for four reasons.⁴³ First, the brewery “had not ceased to exist as a legal person” at the time of the applicants’ complaint, despite being in full liquidation.⁴⁴ Second, the Court gave weight to the fact that the Business Revival Agency, an agency of the Greek state, was not managing the brewery directly.⁴⁵ Instead, two state-appointed liquidators appointed by the Athens Court of Appeal were managing it.⁴⁶ Third, the Court noted that the liquidators appeared to have acted properly by taking “all the measures that they considered to be in the interests of [the brewery’s] assets.”⁴⁷ Finally, if the applicants had been dissatisfied with the liquidators, the applicants could have “taken steps” to have them replaced.⁴⁸

Even assuming these facts are all true, the Court never directly engaged with the applicants’ main argument that the liquidators had “exclusive power to manage and represent the company,” making it impossible for the company to file suit.⁴⁹ Surprisingly, the ECHR even cited the Athens Court of Appeal’s decision appointing two liquidators: “after [the appointment of a liquidator], the powers of the executive organs of [the company] to manage and represent the business are removed and vested in the liquidator.”⁵⁰ If management no longer controlled or exercised influence over the brewery, but the state-appointed liquidators had full control, then it is difficult to understand the Court’s evaluation of the

40. *Agrotexim*, 330 Eur. Ct. H.R. 3 (ser. A) ¶ 68–71.

41. *See generally*, *Agrotexim Hellas S.A. and Others v. Greece*, App. No. 14807/89, Eur. Comm’n H.R. Dec. & Rep. (1994).

42. *Agrotexim*, 330 Eur. Ct. H.R. 3 (ser. A) ¶ 63 (emphasis added).

43. *Id.* ¶¶ 68–70.

44. *Id.* ¶ 68.

45. *Id.* ¶ 69.

46. *Id.* In the Court’s view, this supported Greece’s argument that the brewery was not being directly controlled by the state. *Id.* ¶ 67.

47. *Id.* ¶ 70.

48. *Id.* Clearly, “taken steps” could mean anything, but the Court chose not to suggest possible and realistic actions that the shareholders could have taken to have the liquidators replaced.

49. *Id.* ¶ 61.

50. *Id.* ¶ 20.

situation.⁵¹ Furthermore, the Court noted that the liquidators took some post-bankruptcy actions that suggested they might not have been acting dutifully as agents of the brewery—most importantly, their decision to not appeal adverse court decisions.⁵² Despite acknowledging these facts, the Court did not provide other facts to demonstrate that the liquidators were indeed acting properly on behalf of the shareholders. Therefore, it is unclear how the Court arrived at its conclusion that it was still possible for the company to file suit, when the facts appear to demonstrate that this was no longer a possibility.

Furthermore, it is important to note a fairly significant inconsistency between the facts of the case as presented in the European Commission's earlier decision and the facts presented in the ECHR's decision.⁵³ This inconsistency further underscores the possibility that the Court did not fully consider whether the state-appointed liquidators were acting as agents of the company. The European Commission noted that at the shareholders' meeting before liquidation, the shareholders voted to appoint a *sole liquidator* to exclusively represent the interests of the company.⁵⁴ This sole liquidator, designated by the *shareholders*, not by the Athens Court of Appeal, dutifully brought actions against Greece, the City of Athens, and the mayor of Athens in his personal capacity.⁵⁵

The events that followed, as presented in the European Commission's decision, demonstrate that the ECHR did not adequately consider the applicants' argument that the state-appointed liquidators were not acting in the interests of the company or the shareholders.⁵⁶ It was only *after* the sole liquidator filed the aforementioned lawsuits that the Greek government decided to intervene: "[u]pon request of the Greek State, in its capacity of creditor of the [brewery], the *Minister for Economic Affairs ordered . . . the*

51. *See id.*

52. For example, immediately after the liquidators were appointed by the Athens Court of Appeal, the Athens Court of First Instance dismissed the two civil actions that the brewery had lodged, holding that (1) the acts of the Athens Municipal Council could not be regarded as administrative acts that caused damage to the company's property rights, and (2) that neither the decisions of the Athens Municipal Council nor its public statements about taking the property gave rise to liability requiring compensation. *Id.* ¶ 21. The two liquidators did not appeal these judgments, and they accordingly became final. *Id.*

53. *See Agrotexim Hellas S.A. and Others v. Greece*, App. No. 14807/89, Eur. Comm'n H.R. Dec. & Rep., ¶¶ 25–26, 29 (1994).

54. *Id.* ¶ 25.

55. *Id.* ¶ 26. By contrast, the ECHR wrote that the shareholders appointed two liquidators at their meeting, and does not make clear that these shareholders were replaced outright by the ones appointed by the Athens Court of Appeal. *See Agrotexim and Others v. Greece*, 330 Eur. Ct. H.R. 3 (ser. A) ¶¶ 15, 20 (1995).

56. *Agrotexim Hellas S.A.*, Eur. Comm'n H.R., ¶¶ 27, 29.

winding up of the company under the provisions of [the applicable law].”⁵⁷ After accepting an application made by the Minister for Economic Affairs, the Athens Court of Appeal replaced the sole liquidator appointed by the shareholders with two that it appointed itself: one to represent the interests of the National Bank of Greece, and the other to represent the interests of the company.⁵⁸ With the Minister for Economic Affairs directing the winding up of the company, as well as initiating the action to replace the liquidator appointed by the shareholders, it leaves even more doubt that the liquidators who were appointed by the Athens Court of Appeal were acting in the interests of the company.

The ECHR’s decision, by contrast, states that the shareholders appointed two liquidators at their shareholders’ meeting.⁵⁹ More importantly, it does not make it clear that these two liquidators were *fully replaced* by order of the Athens Court of Appeal.⁶⁰ It is unclear why the ECHR did not address these facts in its decision. Regardless, two state-appointed liquidators replaced the actor who the shareholders independently chose to represent their interests.

Relying on the formalistic view of the brewery’s continued existence as a legal person, despite the fact that its management was no longer in control, the Court proceeded in its analysis without seriously questioning the liquidators’ representation of the brewery.⁶¹ The Court reasoned that the liquidators could legally represent the brewery and bring suits on its behalf, if they felt that it was necessary.⁶² However, when one of the liquidators is a direct agent of the state that has allegedly interfered with the company’s property in the first place, and the liquidators were ordered to act in concert, does it truly seem plausible that the liquidators would protect the rights of the company to the extent that management otherwise would? The European Commission followed this more skeptical line of reasoning, determining that it was likely that “the state appointed liquidator would refuse to take action against the municipal authorities of Athens, another (albeit local) part of the Greek State.”⁶³ The Court should have engaged

57. *Id.* ¶ 27 (emphasis added).

58. *Id.* ¶ 29.

59. Ultimately, it is unclear whether the European Commission or the ECHR is correct as to the number of liquidators who were appointed by the shareholders.

60. See *Agrotexim*, 330 Eur. Ct. H.R. 3 (ser. A) ¶¶ 15, 20 (describing the Athens Court of Appeal’s appointment of the two new liquidators, but never explicitly says that they replaced the ones chosen by the shareholders).

61. See *id.* ¶¶ 66, 68.

62. *Id.* ¶ 68.

63. Emberland, *Corporate Veil*, *supra* note 12, at 952. Furthermore, the Court wrote that victim status would only be granted in cases where it was “impossible for the company to apply to the

with the applicants' control argument more seriously, rather than superficially rejecting it on formalistic grounds.

Furthermore, the ECHR analysis mischaracterized the European Commission's finding that the applicants met the victim requirements of Article 34, and that Greece violated the applicants' rights under Protocol 1.⁶⁴ The ECHR framed the European Commission's decision as simply stating that if shareholders experience any loss in the value of their shares, then a Protocol 1 violation is present.⁶⁵ This was not the Commission's conclusion; on the contrary, the Commission specifically stated that it was the quality of the shareholders as *majority* shareholders, and not merely any effects on their financial interests, that implicated their rights.⁶⁶ Additionally, the Commission noted that the rights infringed were the company's property rights as a result of the Greek government's *de facto* expropriation, thereby "indirectly affecting" the applicant shareholders' rights as well.⁶⁷ Again, it was not merely the diminution in the value of the applicants' shares that gave rise to a violation. The ECHR's mischaracterization of the European Commission's decision is unwise and unworkable. However, as explained below, the alternative that the ECHR created is not at all preferable.⁶⁸

The final problem with the ECHR's decision is the test that it created for determining shareholder standing in future cases.⁶⁹ Specifically, the Court offered no guidelines for delineating the standard that it would use to determine the Article 34 victim status of future applicant shareholders. It wrote that granting shareholders separate victim status from the company "will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions . . ."⁷⁰ In the rest of the opinion, there is no further

Convention institutions through the organs set up under its articles of incorporation or—in the event of liquidation—through its liquidators." *Agrotexim*, 330 Eur. Ct. H.R. 3 (ser. A) ¶ 66. However, it seems strange to assume that such a liquidator would be fully acting in the interests of the company when it was the government that interfered with the property in the first place.

64. *Agrotexim Hellas S.A. and Others v. Greece*, App. No. 14807/89, Eur. Comm'n H.R. Dec. & Rep., ¶¶ 47, 59 (1994).

65. See *Agrotexim*, 330 Eur. Ct. H.R. 3 (ser. A) ¶ 64 ("[T]he Commission seems to accept that where a violation of a company's rights protected by [Protocol 1] results in a fall of the value of its shares, there is automatically an infringement of the shareholders' rights under that Article.").

66. *Agrotexim Hellas S.A.*, Eur. Comm'n H.R., ¶ 59. As majority shareholders, the applicants' rights were infringed because their ownership of the company was harmed by the *de facto* expropriation. The same would not be true for minority shareholders.

67. *Id.*

68. See *infra* Part II (discussing the problems with the current test).

69. See *Agrotexim*, 330 Eur. Ct. H.R. 3 (ser. A) ¶ 66.

70. *Id.*

mention of what would constitute “exceptional circumstances.” While the Court has clarified this phrase in later cases, it has done so in a piecemeal way, depriving potential applicants of any predictable means of knowing whether or not their particular case would meet the requirements of Article 34.⁷¹

Overall, the ECHR’s treatment of the facts in *Agrotexim* leaves serious concerns about the factual basis for the shareholder standing test that it developed from that case. As a result, the validity of that test must be called into question. The Court evidently viewed the facts in a certain light and applied its reasoning and the practice of other courts in a manner that was not necessarily appropriate. In order to demonstrate this latter point, the next section will address the legal analysis of *Barcelona Traction*, the case that appears to be the ECHR’s main source of inspiration for its *Agrotexim* test.

C. The Court’s inspiration: *Barcelona Traction, Light and Power Company, Limited*

The ECHR wrote that the “non-identification” principle (namely, not granting shareholders standing independently from their company) that it adopted in *Agrotexim* came from “[t]he Supreme Courts of certain member States of the Council of Europe” and the International Court of Justice, specifically the *Barcelona Traction* case.⁷² *Barcelona Traction* was a landmark case decided in 1970 between Spain and Belgium at the ICJ.⁷³ For the first time, the ICJ addressed the question of to what extent shareholders had standing under customary international law for purposes of diplomatic protection.⁷⁴ Specifically, Belgium attempted to sue Spain on behalf of Belgian shareholders who represented almost 90% of the shareholders of the Barcelona Traction Company.⁷⁵ Belgium argued that

71. Compare *Pine Valley Dev. Ltd. v. Ireland*, App. No. 12742/87, Eur. Ct. H.R. (ser. A) (1991), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57711> (granting victim status to a shareholder applicant under the “mere vehicle” rationale), with *Credit & Indus. Bank v. the Czech Republic*, App. No. 29010/95, Eur. Ct. H.R. ¶ 51 (2003) (unreported) (granting victim status to a shareholder applicant because the “essence of the complaint” was that the company had not been given a chance to contest the appointment of a compulsory administrator in bankruptcy). See also *infra* Part II.B for an explanation of the fragmented line of cases treating shareholder rights post-*Agrotexim*, and Part III.A.2 for a longer discussion of *Pine Valley*.

72. *Agrotexim*, 330 Eur. Ct. H.R. 3 (ser. A) ¶ 66.

73. *Id.* (citing *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 1). The reasoning and outcome of *Barcelona Traction* has since been cast into doubt by scholars and practitioners. See *infra* Part I.D.

74. See *Barcelona Traction*, 1970 I.C.J. 1; Emberland, *Human Rights of Companies*, *supra* note 5, at 71–72 (discussing the case’s relevance for the ECHR).

75. See *Barcelona Traction*, 1970 I.C.J. at ¶¶ 24–25.

Spain had expropriated the company immediately after World War II without ever paying compensation.⁷⁶

The majority of the ICJ determined that Belgium did not have standing to bring suit on behalf of its shareholders.⁷⁷ However, the ICJ also discussed whether the shareholders themselves could have separate claims from Barcelona Traction as a company.⁷⁸ In dicta, which is where the ECHR later found the substance for its test in *Agrotexim*, the Court distinguished between shareholder *rights* and shareholder *interests*.⁷⁹ Shareholder rights would be entitled to protection because they gave rise to an independent cause of action, including the right to dividends issued, voting rights, and “the right to a share in a company’s residual assets after liquidation.”⁸⁰ Shareholder *interests*, on the other hand, would not enjoy protection.⁸¹ Interests do not give rise to an independent victim status because they are merely financial and linked to the existence of the company itself.⁸² The majority wrote that “whenever a shareholder’s interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action: for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.”⁸³

Furthermore, the majority of the ICJ was adamant about the requirement that it must be *impossible* for a company to bring suit by itself

76. See *id.* ¶¶ 9–10. For a much longer and excellent analysis of the facts of the *Barcelona Traction* case, see generally Rupert Coldwell, *The Limited Protection of Corporations and Shareholders at International Law*, 14 INT’L TRADE & BUS. L. REV. 358, 361–63 (2011); Laurence Jahoon Lee, *Barcelona Traction in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years Later*, 42 STAN. J. INT’L L. 237, 275 (2006); Brigitte Stern, *La protection diplomatique des investissements internationaux—de Barcelona Traction à Elettronica Sicula ou les glissements progressifs de l’analyse*, 117 JOURNAL DU DROIT INTERNATIONAL, 897, 897–948 (1990).

77. *Barcelona Traction*, 1970 I.C.J. at ¶ 103.

78. *Id.* ¶¶ 34–45.

79. *Id.* ¶ 37.

80. Christoph Schreuer, *Shareholder Protection in International Investment Law*, in COMMON VALUES IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 601, 616 (Pierre-Marie Dupuy, Bardo Fassbender, Malcolm N. Shaw, Karl-Peter Sommermann, eds., 2006); *Barcelona Traction*, 1970 I.C.J. at ¶ 47; Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, ¶ 106. Interestingly, the ECHR’s decision in *Agrotexim* did not address this last right, and instead relied on the brewery’s alleged continued ability to pursue claims itself (in other words, the lack of impossibility).

81. See *Barcelona Traction*, 1970 I.C.J. at ¶ 37.

82. See *id.*; see also Emberland, *Corporate Veil*, *supra* note 12, at 946 (“[T]he corporate veil presupposes a fundamental distinction between shareholder rights, which belong to the shareholder directly, and shareholder interests in the company, which are not thought of as pertaining to the shareholder person but rather the company as such.”).

83. *Barcelona Traction*, 1970 I.C.J. at ¶ 44.

in order to grant shareholders standing, such as when the company is in “legal demise” and its shareholders have no other way to obtain a remedy.⁸⁴ Interestingly, in support of its argument, the ICJ relied on the fact that *Barcelona Traction* had been in receivership at the time of the filing of the complaint, *not* in liquidation.⁸⁵ Generally, liquidation is understood as a process that terminates the existence of a company, while receivership has been described as a process that “foster[s] the assets” of a company that is in financial trouble.⁸⁶ The ICJ specifically distinguished between these two legal statuses, and wrote: “[f]ar from implying the demise of the entity or of its rights, [the status of receivership] much rather denotes that those rights are preserved *for so long as no liquidation has ensued*.”⁸⁷ While a company under a receivership would be “limited in its activity,” it would nevertheless be able to “retain[] its legal capacity” and “the power to exercise” that capacity through its manager appointed by a court.⁸⁸

It is curious that, despite the ICJ’s explicit distinction, the ECHR nevertheless adopted the *Barcelona Traction* test in *Agrotexim*, a case in which the corporation was well underway in the *liquidation* process at the time of the shareholders’ complaint to the Court.⁸⁹ While the ECHR could have interpreted Article 34 in a way that was completely independent of the *Barcelona Traction* case, its explicit and approving citation to the decision indicates that at the very least, *Barcelona Traction* heavily influenced the decision in *Agrotexim*.⁹⁰ After all, as one commentator has noted, the ECHR is “clearly not bound by rules or principles confirmed by another international court in a different, albeit partly related, part of international law.”⁹¹ It is therefore unclear why the ECHR nevertheless chose to adopt this particular test.

This section has explained the ECHR’s shareholder standing jurisprudence through an analysis of *Agrotexim*, the problematic factual inquiry that the ECHR performed in that case, and the origins of the legal

84. *Id.* ¶ 66 (“Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their government could arise.”).

85. *See id.* ¶ 67.

86. *See, e.g.,* *People of Mich. v. Mich. Trust Co.*, 286 U.S. 334, 344 (1932) (holding that taxes that accrued while the receiver had control of the company were considered “expenses of administration” because the company continued to operate and exist, and therefore the taxes had priority over the claims of unsecured creditors).

87. *Barcelona Traction*, 1970 I.C.J. at ¶ 67.

88. *Id.* ¶ 68.

89. *See Agrotexim and Others v. Greece*, 330 Eur. Ct. H.R. 3 (ser. A) ¶ 66 (1995).

90. *See id.* ¶ 66.

91. Emberland, *Human Rights of Companies*, *supra* note 5, at 89.

standard that it ultimately borrowed from the *dicta* of *Barcelona Traction*. Part II will discuss the criticisms of *Barcelona Traction*, and it will explain how the *Agrotexim* standard—the product of problematic facts and questionable law—has led to inconsistent results for shareholders before the ECHR.

II. UNDERSTANDING THE PROBLEMS UNDER THE CURRENT APPROACH OF THE ECHR

As discussed in Part I, the *Agrotexim* test was based on facts that did not necessarily support the standard that the ECHR eventually adopted, a standard that was itself borrowed from the ICJ's *dicta* analysis in *Barcelona Traction*. In addition to the problematic factual issues already raised, Part II will first explain the criticism that has been levied against *Barcelona Traction*. It will then argue that this criticism demonstrates that the original justifications for using the *Barcelona Traction* test may no longer be appropriate, and that the value of continuing to borrow this test may be limited. Part II will also describe how the ECHR, using a test that is based on unclear facts and *Barcelona Traction*'s outdated standard, has inconsistently treated shareholders who attempt to bring claims before it.

A. Moving away from *Barcelona Traction*: the modern approach

In the nearly fifty years since its adoption, *Barcelona Traction*'s rigid test has been widely criticized as outdated by scholars and practitioners, primarily in the fields of international investment law and international arbitration. One scholar has written that the case is “venerable but obsolete,” and it has left uncertainty in international law that even the International Law Commission has been unable to resolve.⁹² The main criticism argues that since *Barcelona Traction* was decided in 1970, there has been an increased willingness in international tribunals to allow shareholders to have independent standing from the corporations in which they invest, demonstrating that *Barcelona Traction*'s continued relevance is questionable.⁹³ For example, an arbitral tribunal at the International Centre

92. See Lee, *supra* note 76, at 275 (discussing the repercussions of *Barcelona Traction* primarily for bilateral investment treaties and foreign direct investment). Indeed, one scholar has gone so far as to write that *Barcelona Traction* “no longer reflects the current state of international law.” Schreuer, *supra* note 80, at 601–02, quoting Ian A. Laird, *A Community of Destiny—The Barcelona Traction Case and the Development of Shareholder Rights to Bring Investment Claims*, in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* 77, 77 (Todd Weiler, ed., 2005).

93. See, e.g., Schreuer, *supra* note 80, at 601–02 (discussing the impact of *Barcelona Traction* in international investment arbitration proceedings).

for Settlement of Investment Disputes (ICSID) determined that a group of shareholders had standing because there were no principles in “general international law” that prohibited the treaty governing their investment from granting standing to shareholders (even minority shareholders).⁹⁴ Indeed, one scholar has gone so far as to write that *Barcelona Traction* “no longer reflects the current state of international law.”⁹⁵

Particularly when one considers the willingness of states to grant shareholders separate standing in bilateral investment treaties,⁹⁶ it appears that, at least in the area of public international law, states are increasingly willing to envision legal regimes that grant shareholders independent rights from their respective companies.⁹⁷ Even the ICJ itself has arguably started to “implicitly reject” the purely formalistic principle of *Barcelona Traction* in favor of a new pragmatic approach.⁹⁸

In particular, the *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, casts doubt on the continued strength and scope of *Barcelona Traction*.⁹⁹ In *Elettronica Sicula*, the ICJ allowed a claim from the United States to be brought against Italy on behalf of U.S. shareholders under an investment treaty from 1948.¹⁰⁰ Although the claim was ultimately unsuccessful, the case was remarkable because the ICJ side-stepped its reasoning from *Barcelona Traction*. The tribunal did not even analyze the issue of harm

94. Julian G. Ku, *The Limits of Corporate Rights Under International Law*, 12 CHI. J. INT’L L. 729, 752 (2012), citing *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of Sept 25, 2007, 46 I.L.M. 1136, 1144–45.

95. Schreuer, *supra* note 80, at 601–02 (quoting Laird, *supra* note 92, at 77).

96. See, e.g., Patrick Dumberry, *The Legal Standing of Shareholders Before International Investment Tribunals—Has Any Rule of Customary International Law Crystallized?*, 18 MICH. ST. J. INT’L L. 353, 360 (2010) (explaining that “the legal protection for shareholders of corporations investing abroad is offered through the existence of a growing number of bilateral and multilateral investment treaties.”).

97. See Lee, *supra* note 76, at 270–71 (“[I]n practice, BITs and ICSID grant standing more liberally than does *Barcelona Traction* . . . [s]hareholders need not wait for the corporation itself to make a claim against a host state . . . [c]orporations, their shareholders (natural or legal persons), and their respective states of nationality all may bring claims against the host state.”).

98. See, e.g., *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15 (Judgment of July 20, 1989) (holding that a bilateral treaty between Italy and the United States that specifically protected shareholder rights was not limited by the rule from *Barcelona Traction*). See also Emberland, *Corporate Veil*, *supra* note 12, at 968 (arguing that the *ELSI* case demonstrated the ICJ’s “implicit rejection” of the application of its strict holding from *Barcelona Traction*); Laird, *supra* note 92, at 85 (“The *ELSI* case is open to the interpretation that, because the court permitted the US claim, it stands for the proposition that the espousal of shareholder claims is permitted under customary international law, and that the *Barcelona Traction Case* has been effectively superseded as the statement of international law on this issue.”).

99. See generally *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15.

100. See *id.* ¶ 137.

vis-à-vis the shareholders and allowed the United States to represent shareholders' interests, despite the fact that the company still arguably had the ability to bring the claim itself.¹⁰¹ International arbitration tribunals have noted the ICJ's apparent shift in their decisions that have since departed from *Barcelona Traction*.¹⁰² Accordingly, the continued strength, scope, and relevance of *Barcelona Traction* is open for debate. This lack of clarity further calls into question the wisdom of the *Agrotexim* standard for the ECHR's treatment of shareholder standing, as will be discussed below.

To summarize these recent developments, it is fair to characterize the current state of affairs as a shift away from the *Barcelona Traction* principle by international investment tribunals, and a recent reluctance on the part of the ICJ to broadly apply it. These two points are particularly salient in light of the ECHR's reliance on the *Barcelona Traction* principle in *Agrotexim*.¹⁰³ Therefore, because of the problems inherent to the *Barcelona Traction* test, as well as its application to the facts of *Agrotexim*, it is time for the ECHR to revisit its jurisprudence and revise the test. The next section will demonstrate how the current test has not been applied consistently, adding more weight to the argument that it is not as effective a standard as it should be.

B. Highlighting the problems of the ECHR's current approach

As demonstrated above, the *Agrotexim* test for shareholder standing before the ECHR is fraught with problems. A comparison of two ECHR cases involving shareholder applicants, *Agrotexim* and *Sovtransavto Holding v. Ukraine*, demonstrates the Court's inconsistencies in applying the test, and reveals why it needs to be revised.¹⁰⁴

First, in *Agrotexim* the Court immediately reviewed the applicants' standing under Article 34 of the European Convention and solely focused on the fact that the company in question could still initiate proceedings at

101. *Id.* The United States lost on the claim for damages. The general consensus in the international investment community is that the ICJ had rejected Italy's narrow and restrictive interpretation of the investment treaty, allowing for a much greater protection of American investors abroad.

102. "[T]he *Elettronica Sicula* decision evidences that the International Court of Justice itself accepted . . . the protection of shareholders of a corporation by the state of their nationality in spite of the fact that the affected corporation had a corporate personality under the defendant state's legislation." CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, ¶ 44 (July 17, 2003).

103. See *Agrotexim and Others v. Greece*, 330 Eur. Ct. H.R. 3 (ser. A) ¶ 66 (1995).

104. *Id.*; *Sovtransavto Holding v. Ukraine*, App. No. 48553/99, 38 Eur. H.R. Rep. 44 (2002). See *infra* Part III.B for a longer discussion of the decision in the *Sovtransavto* case.

the ECHR on its own behalf.¹⁰⁵ Therefore, as far as the Court was concerned, the impossibility test was not satisfied.¹⁰⁶

Despite being able to take other factors into account, the ECHR neither raised nor evaluated any other factors specific to the facts of the case in its analysis, such as the degree of control that the majority shareholders exercised, or the amount of harm that they suffered.¹⁰⁷ In fairness to the ECHR, the applicants did not base their claim on a violation of their vested rights as shareholders of the company. Instead, they founded their victim status primarily on the ground that the government's interference with the company's property had adversely harmed their financial interests.¹⁰⁸ However, the Court also did not consider the amount of financial harm to the shareholders in its analysis.

The Court's inconsistent approach to evaluating standing under Article 34 is apparent in its later judgment, *Sovtransavto Holding*, a case brought by shareholder applicants where the Court did not even address the requirements of Article 34.¹⁰⁹ In *Sovtransavto Holding*, a Russian holding company's 49% ownership of a Ukrainian company dropped to 20.7% after the managing director of the Ukrainian company increased the company's share capital three times.¹¹⁰ As a result, the shareholder's rights were severely affected: the applicant went from being the controlling shareholder to a minority shareholder.¹¹¹

After unsuccessful proceedings in Ukrainian court, the applicant filed a complaint at the ECHR to declare the decisions of the managing director null and void.¹¹² The ECHR *did not even address* whether or not the

105. See *Agrotexim*, 330 Eur. Ct. H.R. 3 (ser. A) ¶ 66.

106. See *id.* (“[T]he disregarding of a company's legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or—in the event of liquidation through its liquidators.”). Again, this line of reasoning is potentially problematic due to the ICJ's distinction between receivership and liquidation in the original *Barcelona Traction* decision. See *supra* Part I (discussing the flaws in *Agrotexim* and *Barcelona Traction* and the interaction between both).

107. See *Agrotexim*, 330 Eur. Ct. H.R. 3 (ser. A) ¶¶ 65–71. Additionally, the Court's reasoning on this point is called into question when one recalls that at the time of the submissions to the ECHR, the company was under the control of two liquidators as proscribed under Greek law: one liquidator was meant to represent the interests of the company, and the other was meant to represent the interests of the government, but both were appointed by the Athens Court of Appeal. *Id.* ¶¶ 20, 60. The applicants argued that both liquidators proved to be exclusively loyal to the government, and had not represented the company in good faith. *Id.* ¶ 61.

108. See *id.* ¶ 62.

109. *Sovtransavto Holding v. Ukraine*, App. No. 48553/99, 38 Eur. H.R. Rep. 44 ¶ 93 (2002).

110. *Id.* ¶¶ 11–13.

111. *Id.*

112. *Id.* ¶¶ 44–47.

requirements of Article 34 had been met. Despite the applicant's status as a minority shareholder, which would certainly raise doubts about its ability to have separate standing from the company, and the possibility for the company to bring the suit itself, Article 34 was merely mentioned briefly in the first paragraph of the decision.¹¹³ Instead of performing the same Article 34 analysis as it performed in *Agrotexim*, the Court moved straight to its analysis under Protocol 1.¹¹⁴

The differing outcomes in these cases demonstrate that the *Agrotexim* test is insufficient to explain the Court's reasoning and the progression of its analysis in its later cases involving shareholder applicants. Factors that feature prominently in some cases are almost completely ignored in others.¹¹⁵ Instead of playing this analytical guessing game, the Court should unambiguously enunciate the factors that it will consider in evaluating shareholders' victim status. These factors are explained in detail below in Part III.

III. TOWARDS A NEW STANDARD TO DETERMINE SHAREHOLDER STANDING BEFORE THE ECHR

As explained above in Parts I and II, the ECHR's current standard for evaluating whether shareholders are victims under Article 34 of the European Convention in order to determine their standing is flawed for many reasons. It is uncharacteristically formalistic, founded on cases and analyses that may not have been fully applicable, and applied inconsistently without sufficient explanation.¹¹⁶ While corporations have benefitted from

113. *Id.* ¶ 1 (“The case originated in an application (no. 48553/99) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian company, Sovtransavto Holding (“the applicant company”), on 11 May 1999.”). Article 34 was not mentioned again in the decision.

114. *See infra* Part III.A.1 (discussing how the Court disposed of the Protocol 1 claim on the merits in *Sovtransavto*). A similar scenario played out in *Olczak v. Poland*, 2002-X Eur. Ct. H.R. 44 (2002), where the applicant alleged that a decision of the Board of Receivers of a limited liability bank caused his shareholding percentage to drop from 45% to 0.4% (they did so by increasing the share capital of the bank). The Court held that this constituted a violation of Protocol 1, under its provision for deprivation of property, without spending any of its analysis on whether the applicant met the standing requirements of Article 34. *Id.*

115. *Sovtransavto Holding*, 38 Eur. H.R. Rep. 44; *see also* OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, Eur. Ct. H.R., Judgment ¶ 1 (2012) (granting standing to the applicant shareholders without a discussion of whether they met the requirements of Article 34); *but see* OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, Eur. Ct. H.R., Judgment on Just Satisfaction (2014) (Bushev, J., dissenting in part) (“We believe that the majority has in essence departed from the Court's case-law regarding the criteria for assessing a company's shareholders as victims and injured parties.”).

116. *See infra* Part II.

the European Convention's protections at the ECHR,¹¹⁷ shareholders have only benefitted from the Court's protection under extremely limited circumstances, leaving themselves much more vulnerable to government actions. Therefore, rather than whittling away at the *Agrotexim* maxim by carving out a variety of exceptions that have been applied inconsistently and without sufficient explanation, the ECHR should explicitly adopt a more transparent test.

In particular, the ECHR should use a multifactor test to determine whether shareholders should be granted victim status under Article 34 of the European Convention and consequently, whether they should have standing before the Court. The analysis would include the following factors: whether the shareholders claimed that one of their legal rights was infringed (as opposed to harm done to their monetary interest), the extent to which the shareholders exercised control over the company, whether it was impossible for the company to file suit at the ECHR, and the severity of the harm that the shareholders suffered.¹¹⁸

This multifactor test would achieve a number of beneficial results for the Court. First, it would help to fill a gap in the ECHR's jurisprudence, since the ECHR does not frequently protect foreign shareholders, despite corporations enjoying protection under the European Convention regime.¹¹⁹ Second, the test would clarify the Court's reasoning instead of leaving the parties and interested scholars to guess which factors are important in the Court's analysis and whether such factors will remain important in the future.¹²⁰ The factors need not all be mandatory for the Court to grant standing, but each should be evaluated in connection with the others. Finally, such a test would bring the ECHR closer to the practice of

117. See, e.g., *supra* note 7.

118. These factors have been derived from the Court's analyses in *Agrotexim* and its later cases that treat this issue, in analyzing and reviewing the texts of the decisions to determine what the Court has relied on in making its standing determinations. Emberland has also discussed these factors in the context of his observation that the Court adopts a flexible approach to applying the *Agrotexim* standard. See Emberland, *Corporate Veil*, *supra* note 12, at 953-96. This Note goes one step further, in proposing that the Court should move from the flexible (and inconsistent) application of a strict rule, to a multifactor analysis that explicitly evaluates the most important factors.

119. See Protocol 1, *supra* note 6, art. 1 ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." (emphasis added)).

120. Even scholars who are otherwise supportive of this part of the Court's approach have acknowledged the Court's cryptic approach in its analysis. See Emberland, *Human Rights of Companies*, *supra* note 5, at 104-05 ("The factors . . . [used by the Court], whether they are found expressly in the case law or not, are important because they have immediate bearing on the underlying rationale. But the Court . . . also consider[s] other factors, some of them subjective and very concrete, which they openly acknowledge to have relevance . . ." (emphasis added)).

international investment tribunals. This development would be beneficial to both systems by promoting uniform treatment of similarly situated claimants and potentially stimulating more productive collaboration between the two legal systems.¹²¹

Here, it is important to emphasize that this Note does not advocate that the ECHR grant shareholders standing to the extent that arbitral tribunals have done so. There are several reasons why the ECHR should be more restrictive than international investment tribunals in this area. First, the ECHR should not go as far as bilateral investment treaties in granting standing to shareholders in order to avoid a further increase in the Court's caseload, which is already backlogged by nearly 100,000 cases.¹²² It is a completely fair concern that if a blanket rule granting shareholder standing were adopted, shareholders would bring claims to the Court any time a member state did something that decreased the value of their stock. Therefore, in the interests of efficiency and the functioning of the Court, a test specifically designed to be more restrictive seems legitimate and entirely appropriate.

Second, the ECHR should not come too close to interfering with the legal systems of member states that do not allow for separate standing of shareholders.¹²³ Imposing shareholder standing in every case could incentivize national governments to revise their own corporate laws to reflect the approach of the ECHR.¹²⁴

Third, there may be other venues better suited than the ECHR to hear the majority of the kinds of cases that aggrieved shareholders would like to bring, such as complaints regarding the decrease in share value as a result of an action by a member state. Investment tribunals, whether *ad hoc* or conducted by ICSID, may be more appropriate fora for such claims, particularly where shareholders are explicitly given standing in bilateral

121. See, e.g., Schreuer, *supra* note 80, at 618–19 (citing Stanimir Alexandrov, *The 'Baby-Boom' of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as 'Investors' and Jurisdiction Rationae Temporis*, in *THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS* 19, 30 (2005)) (noting that “[i]n sum, it is beyond doubt that shareholders have standing in ICSID to submit claims separate and independent from the claims of the corporation. Moreover, this principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.”).

122. Owen Bowcott, *Backlog at European Court of Human Rights Falls Below 100,000 Cases*, *GUARDIAN* (London) (Jan. 30, 2014), <http://www.theguardian.com/law/2014/jan/30/european-court-human-rights-case-backlog-falls>.

123. As Emberland notes, a blanket rule allowing for shareholder standing “would interfere with national legislative power” in “the majority of legal systems” of member states. Emberland, *Corporate Veil*, *supra* note 12, at 965.

124. See *id.* at 969.

investment treaties.¹²⁵ This is especially true in light of the ECHR's backlog of cases; many shareholders seeking quick relief would likely assert their claims elsewhere.

These considerations demonstrate that the ECHR should not grant shareholders standing in all cases. However, it also should not retain its misguided approach from *Agrotexim*. The ECHR should fully revise its test for determining whether to grant shareholders standing. Instead of a blanket rule that favors shareholder standing, or a presumption against shareholder standing that can only be overcome in "exceptional cases," the Court should develop a broader standard that is less restrictive in providing shareholders with standing, simply in order to treat shareholders in accordance with the objectives of Protocol 1—to protect the property rights of legal and natural persons.

A. Moving toward a new multifactor test

1. Are the shareholders claiming that their rights were infringed, or merely that their financial interests were harmed?

The first factor of this test would be whether or not the government's actions infringed upon a right of the shareholders in question. This factor may seem so obvious that it is not worthy of mentioning, but then again, it was the Court's main concern in *Agrotexim*.¹²⁶ The question regarding whether rights were violated goes to the heart of Article 34, which states that "[t]he Court may receive applications from any person, nongovernmental organisation or group of individuals *claiming to be the victim of a violation* by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto."¹²⁷ Article 34 therefore makes clear that standing is dependent on a violation of a right protected by the European Convention.

Therefore, the logical starting point is not whether it was impossible for the company to file suit,¹²⁸ but whether the applicant shareholders are claiming that their rights have been violated. Importantly, shareholders whose rights are violated are distinguishable from shareholders who simply experience a decrease in the value of their stock. The two are not mutually exclusive; it is logical that shareholders will bring suit precisely when the

125. See, e.g., U.S. DEP'T OF STATE & USTR, U.S. MODEL BILATERAL INVESTMENT TREATY art. 21(b) (2004) (authorizing shareholders to bring claims under certain conditions).

126. 330 Eur. Ct. H.R. 3 (ser. A) ¶ 64 (1995).

127. European Convention, *supra* note 8, art. 34 (emphasis added).

128. See Schreuer & Kriebaum, *supra* note 5, at 754 ("[In *Agrotexim*,] [t]he ECHR agreed that the decisive criterion was the impossibility of an application by the company itself").

value of their investment has decreased, after their rights are violated. Examples of identified shareholder rights include dividends issued, voting rights, and the right to a share in a company's assets after liquidation.¹²⁹

Whether a right has been violated likely depends on how the corporation's place of domicile would treat the violation under its domestic law. While the ECHR has ruled that the term "possessions" in Protocol 1 is a concept that is "autonomously" defined outside of domestic law,¹³⁰ it looks to domestic laws to determine whether the state's conduct violated Protocol 1's protections.¹³¹ This factor ensures that the shareholders have a rights-based hook to hang their hat on.

Sovtransavto Holding, discussed above in Part II, exemplifies the kind of case whose facts would satisfy this factor.¹³² The applicant, a Russian company that owned 49% of the stock of a Ukrainian company, alleged that the Ukrainian company's managing director had illegally increased the share capital three times, thereby decreasing the Russian company's stake to 20.7%.¹³³ In less than a year, the applicant went from being the controlling shareholder to a minority shareholder.¹³⁴ After unsuccessfully pursuing and exhausting its claims in Ukrainian court, the applicant filed its complaint with the ECHR under Articles 6(1) and 14, as well as Protocol 1.¹³⁵ The ECHR determined that there had clearly been an interference with the applicant's property under Protocol 1 because "the shares held by the applicant company undoubtedly had an economic value and constituted 'possessions.'"¹³⁶

Turning to whether or not that interference had been lawful, the Court framed the issue as whether the national court decisions in Ukraine were consistent with the applicant company's Protocol 1 right to property, or if they had actually interfered with it.¹³⁷ In light of its earlier determination that Ukraine had violated Article 6(1) of the European Convention by

129. See, e.g., *Marini v. Albania*, App. No. 3738/02, Eur. Ct. H.R. ¶¶ 165–67 (2007) (noting that ownership of company stock grants the owner an "indirect claim on company assets, [and also] other rights, especially voting rights and the right to influence the company").

130. See, e.g., *Beyeler v. Italy*, 2000-I Eur. Ct. H.R. 57, ¶ 100 ("[P]ossessions in the first part of Article 1 has an autonomous meaning which . . . is independent from the formal classification in domestic law.").

131. See *Schreuer & Kriebaum*, *supra* note 5, at 745 ("[T]he ECHR has given significance to the treatment under domestic law of the property in question before the interference.").

132. *Sovtransavto Holding v. Ukraine*, App. No. 48553/99, 38 Eur. H.R. Rep. 44, ¶ 93 (2004).

133. *Id.* ¶¶ 11–13.

134. *Id.*

135. *Id.* ¶ 44–47.

136. *Id.* ¶ 91.

137. *Id.* ¶ 95.

denying the applicant a fair hearing, the Court held that “the unfair manner in which the proceedings in issue were conducted had a direct impact on the applicant company’s right to the peaceful enjoyment of its possessions.”¹³⁸ The Court concluded that therefore, Ukraine had also violated the applicant minority shareholder’s rights under Protocol 1.¹³⁹ Of particular concern to the Court were the unfairness of the proceedings and the uncertainty of the resulting judgments, which “upset the ‘fair balance’ that has to be struck between the demands of the public interest” and the Protocol 1 property rights of the applicant shareholder.¹⁴⁰

Accordingly, *Sovtransavto Holding* was not merely about the decrease in the value of the applicant shareholder’s shares. While there was a sharp decrease in value, the shareholder-specific rights that the applicant shareholder enjoyed as majority shareholder were also infringed, all of which stemmed from the original right to ownership of a company’s stock.¹⁴¹ Beyond shareholder-specific rights, the applicant shareholder demonstrated that the government had interfered with its property. Therefore, the value of its investment had decreased by virtue of the Ukrainian court’s refusal to provide a clear resolution to the case.¹⁴²

2. How much control do the shareholders exercise over the company?

The degree of control that shareholders exercise is another factor that the ECHR should consider in weighing shareholder standing. The Court has found this criteria persuasive on at least two occasions where the applicants owned over 90% of a company’s shares and were “carrying out parts [of their] business through [the company]” to such an extent that they had “direct personal interest[s] in the subject matter of the application.”¹⁴³ Even where the ownership does not approach 100%, the degree of shareholder control is clearly an important element to consider, particularly

138. *Id.*

139. *Id.* ¶ 97.

140. *Id.* ¶ 98.

141. *See also* *Bramelid and Malmstrom v. Sweden*, App. Nos. 8588/79 and 8589/79, 29 Eur. Comm’n H.R. Dec. & Rep. 64, 81 (1982) (holding that the forced sale of shares to the majority owner of the company was a violation of Protocol 1 because the shares were “possessions that triggered the right of ownership); *see also* *Marini v. Albania*, App. No. 3738/02, Eur. Ct. H.R. ¶¶ 165–67 (2007); *cf.* *Schreuer*, *supra* note 80, at 618 (citing *Alexandrov*, *supra* note 121, at 4561) (explaining that investment arbitration tribunals have gone even further in defining the rights of shareholders: “[i]t is clear that [arbitral tribunals] all considered it to be beyond doubt that a shareholder’s interest in a company includes an interest in the assets of the company, including its licenses, contractual rights, rights under law, claims to money or economic preference, etc.”).

142. *Sovtransavto Holding*, 38 Eur. H.R. Rep. 44, ¶ 97.

143. *G.J. v. Luxembourg*, 36 Eur. Ct. H.R. 750, ¶ 24 (2003); *Camberrow MM5 AD v. Bulgaria*, App. No. 50357/99, Eur. Ct. H.R., ¶ 1 (2004).

as it is more frequently cited by other international tribunals.¹⁴⁴

Control does not only refer to the monetary stake that shareholders have in a given company. It also refers to the shareholders' personal involvement with the company, for example, if the applicant shareholder is a director or officer of the company. This consideration was significant in *Pine Valley Developments Limited and Others v. Ireland*.¹⁴⁵ The issue was whether Ireland had unlawfully interfered with property that Pine Valley Developments owned, as defined by Protocol 1.¹⁴⁶ In addition to Pine Valley Developments, its sole shareholder, Healy Holding Ltd., and that entity's sole shareholder, Mr. Healy, joined the suit as applicants.¹⁴⁷ In reviewing the applicants' respective standing under Article 34, the Court held that "it would be artificial to draw distinctions between the three applicants as regards their entitlement to claim to be 'victims' of a violation" because Pine Valley and Healy Holdings were simply "vehicles" through which Mr. Healy would implement the development of the property.¹⁴⁸ Accordingly, the Court granted victim status to all three parties under Article 34.¹⁴⁹

3. To what extent was it practically possible for the company to file suit on its own?

Another possible factor is the extent to which it was possible for the company itself to bring the claim before the ECHR. The Court in *Agrotexim* cited a version of this factor that relied on a *hypothetical* impossibility test.¹⁵⁰ However, the impossibility test should rely on *practical* considerations.¹⁵¹ Impossibility will be present most clearly "when the applicant company has ceased to be a legal personality altogether."¹⁵² However, impossibility may also occur if the "circumstances in a given case . . . suggest that the corporate person itself [is] effectively

144. The European Commission noted in *Agrotexim* that the shareholder's control of the company's shares is an "objective and important indication" of its victim status. *Agrotexim and Others v. Greece*, 330 Eur. Ct. H.R. 3 (ser. A) ¶ 156 (1995); see also Dumberry, *supra* note 96, at 357–58 (describing how international arbitral tribunals have considered the issue of control).

145. *Pine Valley Dev. Ltd. v. Ireland*, 222 Eur. Ct. H.R. (ser. A) ¶ 42 (1992). See also *Kaplan v. United Kingdom*, 4 Eur. H.R. Rep. 44, ¶ 130 (1980) (holding that the applicant's interest in the outcome of the litigation "arose from his investment interest in the company and his position as an officer").

146. *Pine Valley Dev. Ltd.*, 222 Eur. Ct. H.R. (ser. A) ¶ 1.

147. *Id.* Neither Healy Holding Ltd. nor Mr. Healy had been involved in the first domestic proceedings against the Irish government. They joined as plaintiffs in later proceedings. *Id.* ¶¶ 10–13.

148. *Id.* ¶ 42.

149. *Id.*

150. See *infra* Part I.B.

151. See Emberland, *Human Rights of Companies*, *supra* note 5, at 94–95.

152. *Id.* at 95.

unable to pursue the claim.”¹⁵³ Accordingly, rather than using the general standard of hypothetical impossibility, practical impossibility is a more clear and accurate standard. Even if the company still technically exists and it is therefore not impossible for it to file suit at the ECHR, it may nevertheless be practically impossible to do so because of particular circumstances—for example, when government-appointed liquidators are not actually acting in the interests of the shareholders.

The ECHR addressed this issue in *G.J. v. Luxembourg*, a case whose facts are more clear-cut than those in *Agrotexim*.¹⁵⁴ The applicant shareholder brought suit against the Luxembourg government, contesting the actions that the company’s liquidators had taken.¹⁵⁵ The Court determined that the applicant had victim status because the effective control of the government made it impossible for the company to bring the case.¹⁵⁶ Other potential cases of practical impossibility may arise if, under domestic law, shareholders themselves are generally prohibited from bringing certain kinds of suits.¹⁵⁷

4. What was the severity of the harm that the shareholders suffered as a result of the government’s actions?

Finally, the severity of the harm that the shareholders actually suffered as a result of measures taken by the government should also be considered. This factor should not be considered in absolute numerical terms. Instead, it should be judged by the harm done to the shareholders’ specific investment relative to their initial investment and the rights they enjoyed at that time.¹⁵⁸ For example, in *Yukos v. Russia*, the harm suffered was severe. After the Putin government confiscated the assets of Yukos—the largest oil company in Russia at the time—its shareholders brought claims at the Permanent Court of Arbitration at the Hague and received an award of \$50 billion, as

153. *Id.* at 96.

154. 36 Eur. H.R. Rep. 750, ¶ 23 (2003).

155. *Id.* In this case, the company’s liquidators were the official receiver and the Commercial Court.

156. *Id.* ¶ 24. Again, the inconsistency of the Court’s approach on this point is evident when one recalls the facts of *Agrotexim*. Emberland notes that “[i]t seems that the more directly involved an organ of the State has been in the alleged contravention,” the more likely it is that the shareholder’s complaint will be admissible. Emberland, *Human Rights of Companies*, *supra* note 5, at 106. Why this was insufficient for the facts of *Agrotexim* is unclear.

157. See Emberland, *Human Rights of Companies*, *supra* note 5, at 95–99 (discussing the various facets of the impossibility argument).

158. See, e.g., *Sovtransavto Holding v. Ukraine*, Ap. No. 48553/99, 38 Eur. H.R. Rep. 44, ¶¶ 11–13 (2002) (The Russian shareholder went from being the controlling shareholder to a minority shareholder in less than a year, after the share capital was illegally increased three times, which decreased the Russian shareholder’s stake by more than half).

well as a \$2.5 billion award from the ECHR.¹⁵⁹ If the shareholders did not substantively suffer great financial harm or other prejudice to their rights (for example, dividends issued, voting rights, and the right to a share in a company's assets after liquidation), the Court may have less reason to grant the shareholders standing, especially when other concerns weigh against allowing the suit to proceed.¹⁶⁰

While this is not an exhaustive list of criteria that the ECHR could use, such a multifactor approach would clarify the rationale that the Court uses to reach a decision, therefore making it easier for potential applicants to determine whether they will be granted "victim" status when bringing suit. It would also enable the Court to adopt the modern doctrine for shareholder standing that other international tribunals use, while providing the Court with enough discretion to continue pursuing the goals and policies enshrined in Protocol 1. Under this proposed test, the Court could treat shareholders' property rights similar to how it treats corporations' property rights, resulting in more consistent jurisprudence.

IV. CONCLUSION

This Note has outlined the ECHR's current shareholder property rights jurisprudence in order to illustrate the weaknesses of the Court's approach in determining shareholder standing and argue for a new standard. It has demonstrated the flaws in the Court's current approach to grant shareholder standing under *Agrotexim v. Greece*, especially in light of the case's factual and legal foundations. Some commentators have argued that the Court's treatment of shareholder claims allows for sufficient flexibility to weigh all the factors of a case.¹⁶¹ However, the Court has given little clarity to what factors it *actually* uses, to the detriment of shareholders who should be able to rely on more predictable outcomes. Furthermore, the current standard has led to inequitable results because the Court has thoroughly examined

159. See Neil Buckley, *Former Yukos Shareholders Awarded \$50bn Damages Against Russia*, THE FINANCIAL TIMES (July 28, 2014), <http://www.ft.com/intl/cms/s/0/f5824afa-1623-11e4-8210-00144feabdc0.html#axzz38kWHdIZA>; see also Andrew E. Kramer, *A Victory for Holders of Yukos*, THE N.Y. TIMES, Dec. 1, 2009, at B1 (describing the arbitral claims brought by Yukos shareholders); Michael D. Goldhaber, *ECHR Piles on Russia with \$2.5 Billion Yukos Award*, THE AMERICAN LAWYER (July 31, 2014), <http://www.americanlawyer.com/id=1202665495907/ECHR-Piles-on-Russia-With-25-Billion-Yukos-Award?slreturn=20140902083029> (describing the litigation at the ECHR and the Court's award).

160. Emberland, *supra* note 5 at 106 (citing *Kustannus Oy Vapaa Ajattelijä AB and Others v. Finland*, 22 Eur. Comm'n H.R. Dec. & Rep. 69, ¶ 1 (1996) (noting that the Commission considered the "minor amounts at stake" in its decision to judge the claims inadmissible under Article 34)).

161. Emberland in particular has been a proponent of this characterization. See Emberland, *Corporate Veil*, *supra* note 12, at 953–56 (discussing the Court's "inescapable element of flexibility" when evaluating shareholder standing).

shareholder standing in some cases and not at all in others.

To address these issues, this Note has proposed a multifactor test for determining whether shareholders have met the “victim” requirement of Article 34 of the European Convention, and consequently whether they should have standing before the Court. The multifactor test would include the following factors: whether the shareholders claim that one of their legal rights was infringed upon (as opposed to their monetary interest being harmed), the shareholders’ degree of control over the company, the extent to which it was impossible for the company to file suit, and the severity of the harm that the shareholders suffered. This approach would help to elucidate the Court’s reasoning in order to provide greater certainty to future shareholder applicants.

As international investment increases, corporations and shareholders will continue to seek investment opportunities that predictably and sufficiently protect their interests. The European Union is the world’s largest recipient of foreign direct investment, with more than €3 trillion in 2014, accounting for 25.4% of total global inward investment flows.¹⁶² This will surely increase as the global economy continues to recover from the events of the late 2000s.¹⁶³ With such important sums at stake, the ECHR should reevaluate its jurisprudence on shareholder property rights so that shareholders may enjoy the full protection granted to them under the European Convention.

162. See EUROPEAN COMMISSION, TRADE AND INVESTMENT 2014 9 (2012), available at http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152062.pdf; see also *EU27 investment flows with the rest of the world recovered in 2011*, 88 EUROSTAT 2012, June 13, 2012, available at http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/2-13062012-BP/EN/2-13062012-BP-EN.PDF.

163. *Id.*